

**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA**

**Cr. Appeal No. 270 of 2004
a/w Cr. Appeal No. 300 of 2004**

Reserved on: 6.9.2007.

Date of Decision: 12th Oct., 2007.

1. **Cr. Appeal No. 270 of 2004**

Dile Ram alias Tejoo & others. Appellants.

Versus

State of Himachal Pradesh Respondent.

2. **Cr. Appeal No. 300 of 2004**

Harnam Singh Appellant

Versus

State of H P. Respondent

Coram

Hon'ble Mr. Justice Surjit Singh, J.

Hon'ble Mr. Justice Surinder Singh, J.

Whether approved for reporting¹? Yes.

Cr. Appeal No. 270 of 2004

For the appellant : Sh. M. S. Guleria, Advocate.

**For respondent : Sh. Som Dutt Vasudeva, Addl. Advocate General
with Sh. D. S. Nainta, Deputy Advocate General.**

Cr. Appeal No. 300 of 2004

**For the appellant: Sh. R.K. Gautam, Sr. Advocate, with Mr Anurag
Sharma, Advocate.**

**For the respondent: Sh. Som Dutt Vasudeva, Addl. Advocate General
with Sh. D. S. Nainta, Deputy Advocate General.**

Per Surinder Singh, J .

This judgment shall dispose of both the above
titled appeals, arising out of the judgment of
conviction and sentence, passed by the Fast Track

Whether reporters of the Local papers are allowed to see the judgment? Yes.

Court, Mandi, H.P. in Sessions Trial No.18/2000 (62/2004) on 24.6.2004 against the appellants under sections 302, 325, 323 and 341 read with section 34 of the Indian Penal Code for allegedly causing the death of one Chaman Lal and grievous hurt to Shamsher Singh.

The appellants were sentenced as follows:

1. Dile Ram	(i) Rigorous Imprisonment for life and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo further simple imprisonment for a period of 2 years under Section 302/34 of the Indian Penal Code.
2.Surender Kumar	(ii) Rigorous Imprisonment for a period of 2 years and to pay a fine of Rs.2,000/- and in default of payment of fine to undergo further simple imprisonment for a period of 1 year under Section 325/34 of the Indian Penal Code.
3.Jagdish Chand,	(iii) Simple Imprisonment for a period of six months under Section 323/34 of the Indian Penal Code; and
4. Harnam Singh	(iv) Simple Imprisonment for a period of one month under Section 341/34 of the Indian Penal Code.

Prosecution case

The factual matrix of the prosecution case is that on 10.4.2000, Shamsher Singh complainant (PW2) and his elder brother Chaman Lal (deceased) were going from **Chalarag** village, to the house of their Bua (father's sister) Smt.Kamla Devi (PW11). It is alleged that previously Surinder Kumar appellant had beaten up Shamsher Singh (PW2). On 10.4.2000, at about 11 AM, said Surinder Kumar met them near village **Machhiyal**. Shamsher Singh had asked him, as to why he had beaten him earlier, on this Surinder Kumar who was alone started giving fist and kicks blows and also gave him 3-4 slaps. On this, Shamsher Singh and Chaman Lal both retracted to their house but hardly could they cover a

short distance, they were chased by the convict-appellants on their tractor. The appellants were equipped with their weapons in their hands viz. Jagdish Chand was having a metal-grip, Dile Ram a wooden-bat, Harnam Singh a danda and Surrender had a screw-driver. When they reached nearer to the complainant and his brother Chaman Lal, they parked the Tractor and got down from it and then all the appellants started giving beatings to Chaman Lal and Shamsher. It is alleged that Dile Ram gave a bat blow on the head of Chaman Lal and the injury started bleeding, he fell down, his shirt was torn. Harnam Singh gave a danda blow to Shamsher Singh (PW2) and Surrender caused injuries with his screw driver on the nose and head of Shamsher Singh. When this fight was going on, Jagdish (PW3) and Ramesh Chand (not examined) came to the spot and rescued Chaman Lal and Shamsher Singh from the appellants and thereafter the appellants ran away.

Chaman Lal on sustaining head injury became unconscious, he was removed to the house of Jagdish (PW3) with the help of Ramesh. Som Dev (PW9) the father of Chaman Lal was also informed, thereafter the injured were taken to the hospital at Jogindernagar.

Opinion of the Doctor(s)

Dr.M.K.Rana medically examined both Chaman Lal and Shamsher Singh (PW2) and issued the MLC Ex.PB and Ex.PC respectively.

In the opinion of the Doctor, injuries No.1 and 2 on the person of Chaman Lal were dangerous to life, therefore, he was referred to I.G.M.C. Shimla and from there he was referred to P.G.I.Chandigarh, but he died on his way to Chandigarh whereas Shamsher Singh had sustained the fracture of shaft of ulna.

The police was informed and ASI Narinder Singh visited hospital at Joginder Nagar and moved an application (Ex.PA), seeking opinion of the Doctor, whether Shamsher Singh (PW2) was fit to make the statement. Since Shamsher Singh was found fit, thus his statement (Ex.PD) was recorded u/s 154 Cr.P.C., on the basis of which FIR Ex.PZ/A was formally registered.

Dr.Sushil Chander (PW3) conducted autopsy of the dead body of Chaman Lal and issued the post mortem report Ex.PF. In the opinion of the Doctor the deceased had died of intracerebral hemorrhage leading to shock due to head injury.

Police investigations and its result

The police visited the spot, collected the blood stained earth, bajri-stones and prepared the site plan. One arm torn from the shirt was found on the spot which was also taken into possession vide memo Ex.PY. Surender Kumar and Jagdish appellant got recovered screw-driver and a metal-grip respectively pursuant to their disclosure statements in the presence of Om Parkash (PW7) and Harish (PW8) and Dile Ram got recovered wooden bat and Harnam Singh a danda.

The police took photographs of the spot. After the receipt of report of Chemical Examiner Ex.PZ/J and completing the interrogation the challan was presented in the court, for trial, under the offences aforesaid.

The appellants were charge sheeted. They pleaded not guilty and claimed trial.

To prove their case, the prosecution had examined 18 witnesses and the statements of the appellants, under section 313 Cr.P.C, were recorded. They denied the circumstances put to them. They raised the defence of false implication. According to them, Chaman Lal (deceased) and Shamsheer Singh (PW2) both gave beatings to Surender, on the said day, who was rescued by the other appellants from there.

The appellants were called upon to enter into their defence. They examined Sunil Kumar (DW1).

Findings of the Trial court

Upon going through the evidence on record and on hearing the counsel for the parties the appellants were convicted and sentenced by the Fast Track Court, as aforesaid, which has been assailed by them in this appeal.

Grounds in appeal

According to the appellants, the trial court has decided the matter in a slip shod manner. In fact it has come in evidence that the alleged incident was witnessed by about 20 persons but no independent witness was examined, whereas the prosecution examined only the interested witnesses who gave a tainted and a

biased version. The statements of the witnesses are contradictory and they have further improved their version in the court, as per their suitability. There has been manipulations in the MLCs. At the worst, the evidence on record makes out a case of free fight and scuffle, the possibility of sustaining the injury by a fall to Chaman Lal and in scuffle to Shamsher Singh cannot be ruled out. The presence of Jagdish Chand (PW13) on the spot is highly doubtful. His statement and the statements of PWs 2 and 12 are absolutely unreliable. The recoveries are fake. Therefore, the judgment of conviction and sentence is liable to be set aside.

Submissions before us:

We have heard Sh.M.S.Guleria, learned counsel for the appellants in Cr. Appeal No.270 of 2004 and Mr. R. K. Gautam, learned Senior Advocate, assisted by Mr. Anurag Sharma, Advocate, in Cr. Appeal No.300 of 2004 and Sh.S.D.Vasudeva, learned Additional Advocate General duly assisted by Sh.D.S.Nainta, Deputy Advocate General for the State and we have carefully and legally scanned the evidence on record.

According to Sh. R. K. Gautam, Senior Advocate and Sh. Guleria, learned counsel for the appellants, the learned trial court had dubbed Hardev (PW 12) a liar, thus there remains only the statements of Shamsher Singh (PW2) and other witness Jagdish (PW13) for appreciation in the light of the statement of Sunil Kumar (DW1). Shri Guleria further ventilated

that the prosecution did not reflect the true story, as to how the incident had started. The independent eye witnesses, though available, were not examined. The story of free fight emerges from the evidence. Therefore, the issue is who is the aggressor? The defence raised has caused a dent in the prosecution case. Dile Ram and Surender has also received simple injuries, recoveries are an eye wash. The real genesis of the case was suppressed. Therefore, the appellants deserve acquittal. In the alternative Shri Guleria urged that at the worst it could be a case under section 304 part II and not u/s 302 IPC, against Shri Dile Ram appellant alone, if the evidence establishes the authorship of a fatal blow to deceased Chaman Lal by him.

Contra, Sh.Vasudeva, learned Additional Advocate General, while supporting the impugned judgment of conviction and sentence, ventilated that the trial court has rightly dealt with every point raised by the learned counsel for the appellants, the conviction is based on the proper appreciation of evidence and the sentence was rightly imposed on the appellants which requires no interference.

To appreciate the rival contentions of the learned counsel we propose to deal with the matter, in view of the settled principles of law as follows:

Our findings.

It is absolutely clear and time tested rule of criminal jurisprudence that the acquittal of a guilty

person should be preferred to a conviction of an innocent person, unless the prosecution establishes the guilt of the accused beyond a reasonable doubt. A criminal court, cannot afford to deprive liberty of the accused, life long liberty, without having at least a reasonable level of certainty that the accused are the real culprits. Further, the golden thread which runs through the web of administration of justice in a criminal case is that, if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. In Shivaji Sahabrao Bobade and another vs State of Maharashtra : (1973) 2 SCC 793, the Supreme Court observed as under:

"Certainly, it is a primary principle that the accused *must* be and not merely *may* be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

Thus keeping in view the above cardinal principles in mind, we proceed to examine the circumstances and the evidence on record.

A- Motive

The motive set up by the prosecution for the alleged crime is that the complainant was beaten up by appellant Surender Kumar, sometime earlier prior to

the alleged incident. On being asked the reasons for such beatings the appellant Surender Kumar gave fist and kick blows to him as a result of which he got swelling on his face and his brother Chaman Lal (deceased) intervened and had rescued him. Thereafter, both of them changed their mind and proceeded towards their house, instead of going to the house of their Bua. When they hardly covered a short distance, Surender along with other appellants came on a tractor and started giving beatings, as stated *supra*.

In the instant case, the prosecution has relied upon the direct evidence as aforesaid. By now it is well established that when direct evidence of eye witnesses is available, the motive relegates to the background. It is equally settled that when there is absence of proof of motive, it has no meaning, if reliable evidence is available. Otherwise also, failure to prove the motive is not always fatal. Even the motiveless crimes are also crimes. However, if the case hinges upon the circumstantial evidence, the motive even if it established, explains the things which remains unexplained.

In the instant case, as already stated above, the alleged eye witnesses were available and examined in the court which requires proper appreciation. Therefore, in the circumstances the proof of motive remains only an academic discussion. Thus, we proceed to scan the evidence on record in the light of the

depositions made by the eye witnesses and the points raised in defence.

B-DIRECT EVIDENCE.

Primarily the prosecution has relied upon its star witnesses Shamsher Singh (PW2), Hardev (PW12) and Jagdish Chand (PW13) the alleged eye witnesses of the crime. All of them belong to the same village. Upon going through their testimonies it is evident that as many as 15-20 persons of Machhiyal village had also witnessed the alleged occurrence but none of them were cited as a witness, to lend strength to the case of the prosecution. Against this background, the witnesses of the occurrence examined by the prosecution in the facts and circumstances of the case are required to be approached with due care and caution. Thus, we proceed to reappraise their evidence.

Precisely, according to Shamsher Singh (PW2) when he along with his brother Chaman Lal was on the way to the house of their Bua (father's sister) they had met Surender appellant and on being asked, as to why Surender had earlier given beatings to the complainant, he gave kicks and fists blows to him and Chaman Lal (deceased) had intervened. Thereafter both of them retracted to their home on foot. Soon after they were followed by the appellants in a Tractor, which was being driven by Jagdish Chand appellant. All of them had given beatings to the complainant and Chaman Lal as aforesaid. PW13, Jagdish has also made

the similar statement but in cross-examination, he had admitted scuffle between the parties and according him, the victim and the accused had repeated falls (up and down) on the pucca floor. Whereas, in his cross-examination, PW2 Shamsheer Singh has stated that the first incident had taken around 10 or 10.30 a.m. at village Machhiyal. At that time, except slapping by Surender no major incident had taken place. He excluded the presence of Jagdish (PW) and Ramesh Chand but stated that the incident aforesaid was witnessed by about twenty persons and out of them he could only identify Tika Ram Lala, who was neither named to the Investigating Officer as a witness of the alleged incident nor examined in the Court. Admittedly, the shops were also open in Machhiyal village by which we can logically conclude that many persons would have witnessed the alleged occurrence, however, only the interested witnesses were examined. The complainant has admitted that appellant Jagdish was working as driver on the tractor of Mangal Singh which was engaged in carrying stones from **Neri Khud** which is enroute, Sarkaghat Machhiyal road over which the alleged incident took place, and it is a different route from Machhiyal village to the village Chalarag of the complainant. Therefore, the presence of the complainant, Chaman Lal (deceased), Jagdish Chand (PW13) and Ramesh on Sarkaghat Machhiyal road, makes the story of the prosecution doubtful that the appellants followed them and gave beatings while going

back to their village after the first incident. Further, PW2 has denied the defense put to him that finding accused Surrender alone, they gave beatings to him. When he ran away, he was caught again by them at a distance of about 50 to 60 yards, in the meantime accused Jagdish came along with other two labours namely Dile Ram and Harnam from Jogindernagar side, they on seeing, beating Surrender, rescued him but the complainant and his party gave beatings to the appellants with hockey and dandas, in that scuffle he (complainant) and his brother Chaman Lal (deceased) had also received injuries. In fact Surrender and Jagdish appellants had also sustained injuries. They were examined by Dr. M.K. Rana (PW1) but their medico legal certificates though obtained by the Police were not produced on record except in cross-examination of Investigating Officer. The above fact to some extent goes consistent to defense version.

PW-12 Hardev is another co-villager of the complainant. He is a chance witness with respect to the first incident, which took place at about 10 a.m. on 10.4.2000. As per him, he had come to village Machhiyal, for purchasing the household goods. Whereas, there were shops in his village which were open on that day. He has admitted that he was not a daily visitor to Machhiyal. Jagdish (PW13) had also not noticed him at or near the place of incident. Therefore, in these circumstances his presence in village Machhiyal at the relevant time becomes

doubtful rendering his testimony unreliable. The another reason for rejecting his testimony is that in Ex.PD, earlier version made by the complainant Shamsher Singh, the name of Hardev (PW12) was also not mentioned. According to PW-13 Jagdish Chand, even did not notice the presence of Hardev on that day. Thus his testimony requires to be totally ignored from consideration.

From the above evidence, it emerges that the tractor in question was engaged in transporting the *Bajri* from river Machhiyal. Admittedly, Jagdish appellant was its driver except Surender appellant other accused were engaged as the labourers. The alleged weapons with them were not unusual. Screw-driver is a part of the Tool - Box of the tractor. Another weapon **Thappi** (Wooden-Bat) is used in washing the clothes, Danda as in this case is commonly available. There was also said be a metal grip with one of them but no injury by this is attributable by it to the injured.

Investigating Officer Shri P.C.Patial (PW17) has also admitted the fact that 20-25 local residents of the village had seen the occurrence, which fact was also referred in the investigation by him but according to him all of them had resiled.

There were injuries on the person of the appellant-accused Surender Kumar, he had as much as five simple injuries on the different portions of the body, including scalp, as per his M.L.C.Ex.A-2.

Similarly the Accused Jagdish Chand (driver of the tractor) had three simple injuries, which fact is indicated in the M.L.C. EX.A-1. Their medical certificates were not appended with the challan but in quizzing the Investigating Officer in his cross-examination, their MLCs were produced on record.

It is pertinent to note that PW3 Dr.Sushil Chander had noticed one injury on the head of the deceased Chaman Lal which was opined to be fatal vide his post mortem report Exhibit Ex PF, though in the cross-examination, he has admitted that the fatal injury can be caused either in scuffle or by fall

On the close scrutiny of the evidence on record we are of the considered opinion that this fatal blow on the head of the deceased is attributable to Dile Ram appellant, however, it is not clear as to who had caused the fracture of complainant Shamsheer Singh nor any of the witnesses had specifically held any of the appellants responsible for it whereas, it is established from the evidence of the prosecution that the complainant party were the aggressors. Therefore in the circumstances, aforesaid, in our view, Dile Ram can only be held responsible for giving a fatal blow on the head of Chaman Lal whereas, no offence is made out against the other respondents even with the aid of Section 34 of the Indian Penal Code that they shared the common intention to cause the death of Chaman Lal or even such an intention had developed subsequently during the scuffle. Therefore, except Dile Ram, the

other appellants are entitled for the benefit of reasonable doubt.

Now the question remains as to what offence Dile Ram appellant has committed? Whether the act of Dile Ram fell within the purview of "murder" or culpable homicide not amounting to murder. It is a question of fact which has to be approached in three stages, **first** of which is whether the accused had done an act by doing which he has caused the death of Chaman Lal. Proof of such casual connection between the act of accused and the death, lead to the **second stage** for considering whether that act of the accused amount to "culpable homicide" as defined under section 299 of the Penal Code. If the answer to this question is prima-facie found in affirmative, the stage for considering the operation of section 300 of the Penal Code is reached. This is the stage to consider whether the case falls within any of the four clauses of the definition of murder as contained in Section 300 aforesaid.

If the answer would be negative, it would be culpable homicide not amounting to murder, punishable under section 304 of the Indian Penal Code under any of the parts depending upon whether it falls under second or third clause of section 299 of the Penal Code or any of the exceptions enumerated in Section 300 aforesaid, but these are not the imperatives, it has to be seen closely and from the above compectus of the case, has to be approached through stages and it

also depends on the facts of each case. Our answer to the above two stages is in affirmative.

In the instant case, regarding the third stage, it is proved on record that there was no premeditation in the attack appears to us an impulsive attack by Dile Ram appellant, causing single injury on the head of deceased in scuffle by a household Thapi (small bat shaped wooden object) meant to wash clothes, thus, in our opinion it is not an offence of murder as defined under section 300 of the Indian Penal Code, as it is the degree of probability of death which determines whether the culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of section 299 conveys the sense of 'probable' as distinguished from a mere possibility. "The distinction is fine but real, and, if overlooked, may result in miscarriage of justice." The words 'bodily injury' sufficient in the ordinary course of nature to cause death mean that death will be the "most probable" result of the injury having regard to the ordinary course of nature.

In other words, the culpable homicide under Section 299 consists in doing of an act;

- (a) with an intention of causing death or
- (b) with the intention of causing such bodily injuries as is likely to cause death or
- (c) with the knowledge that the act is likely to cause death.

The first clause of Section 300 reproduces the first part of Section 299. Therefore, ordinarily if the case comes within clause (a) of Section 299 of the Indian Penal Code, it would amount to murder. However, if one of the special exceptions in Section 300 applies, the offence would be culpable homicide not amounting to murder.

If the act of the accused falls under clause (b) of Section 299, e.g., if the intended bodily injury is likely to cause death as distinguished from one which is sufficient to cause death in the ordinary course of nature, clause thirdly of Section 300 will not apply. Exactly this is the situation in the present case.

In the circumstances and the facts established on the record, the offence committed by appellant Dile Ram would, therefore, fall under the first part of Section 304 of the Indian Penal Code. This is the only probable inference which we have been able to draw.

Conclusion.

Therefore, for the reasons stated above, the alleged act of Dile Ram falls under paragraph I of Section 304 of the Indian Penal Code, which is normally referred as Part I.

Thus, in our considered opinion, appellant Dile Ram has committed an offence under Section 304(I) of the Indian Penal Code and not under Section 302 of the Code, whereas, the appellants Surinder Kumar, Jagdish Chand and Harnam Singh deserve to be acquitted by giving them benefit of doubt which we order accordingly.

Consequently the conviction of Dile Ram appellant-accused under section 302 I.P.C. is converted into one under section 304 (I) of the Indian Penal Code, therefore, Dile Ram appellant is sentenced to undergo rigorous imprisonment for a period of ten years and the sentence of fine imposed by the trial Court is upheld. Accordingly the sentence of Dile Ram stands modified. The appeal filed by Dile Ram is partly allowed. The trial Court is directed to issue modified warrant to the Jail authorities forthwith..

The period of detention, if any, undergone by the said appellant-accused during the investigation and trial is set off against the period of sentence awarded against him, as provided under Section 428 Cr.P.C.

The case property be disposed of as directed by the learned trial court.

The appeal filed by Surinder Kumar, Jagdish Chand and Harnam Singh is accepted and judgment of conviction and sentence passed against them is set aside. They be released forthwith, if not required in any case.

(Surjit Singh), J.

October 12th, 2007
(BM/D)

(Surinder Singh), J.